

Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-88

UNITED STATES OF AMERICA,

Petitioner,

—v.—

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

—
PETITION FOR CERTIORARI FILED JULY 9, 1978
CERTIORARI GRANTED OCTOBER 9, 1978

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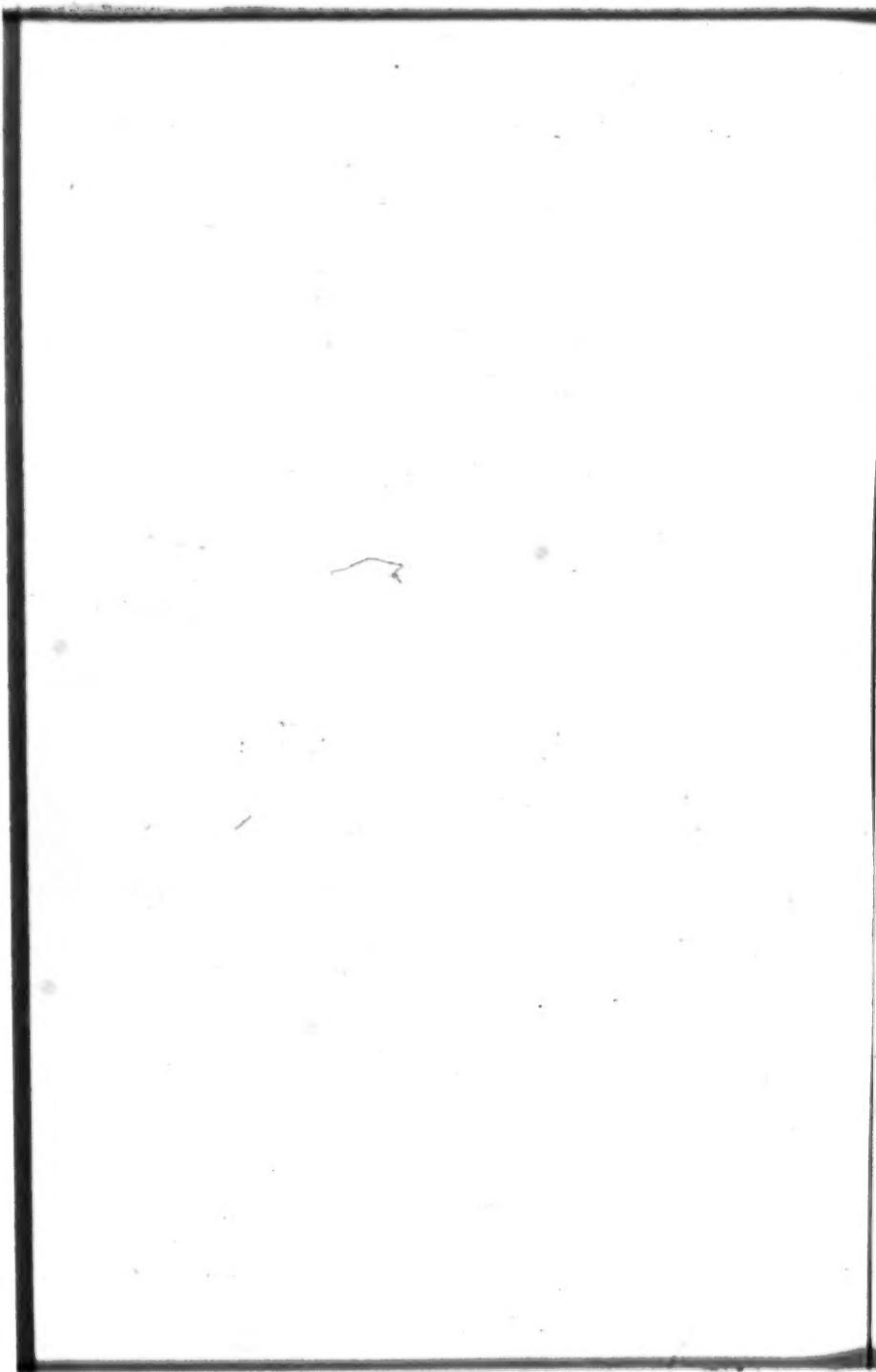
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RELEVANT DOCKET ENTRIES

1. 8/14/70—Indictment, filed.
10. 12/10/70—MOT. TO SUPPRESS EVIDENCE, filed by
Deft. EDWARDS.
21. 1/12/71—ORDER J. Hogan—indicating Defts. will be
permitted to inspect scientific tests,—Over-
ruling Motion of Deft. LIVESAY as to Identity
Passing on Motion of EDWARDS as to
Identification,—Finding Probable cause in ar-
rest of 3 defendants,—Overruling Motion of
LIVESAY to property,—Sustaining Motion of
LIVESAY as to suppression of evidence taken
from Plymouth.—Issued counsel.
35. 9/30/71—Verdict, as to deft. EDWARDS filed; finding
of Guilty, by Jury.

SELECTIONS FROM THE TRANSCRIPT OF THE
HEARING ON THE MOTIONS TO SUPPRESS

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[101] given Mr. McCroom a certified copy of the search warrant. I would assume he would want that made part of the evidence.

MR. McCROOM: Very definitely.

MR. NADEL: Again, I would have no objection. I would stipulate that. The only other thing that I would have on behalf of the government (conferring with Mr. Smith)—

Are you willing to stipulate it as part of the evidence?

MR. McCROOM: Yes.

MR. NADEL: Judge, by stipulation this certified copy of a search warrant is hereby made part of the evidence.

MR. McCROOM: Which includes the affidavit on which that warrant is issued?

MR. NADEL: Yes. As to time stamp and everything else (examining), at 1:30—the search warrant will speak for itself, but it does have a time stamp on it, Judge.

Judge, the only other thing that I have and perhaps counsel could stipulate this—it's up to them. As far as the government, we have one other witness to call and that witness would testify that he is the custodian of—Well, excuse me. We have

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Toller—Direct

[155] A. A short time later I directed that the car be impounded.

Q. I see. You say it was in the early morning hours of June 1st that you first saw it?

A. That I actually first saw the car, yes.

Q. Yes. Was there anyone in it at the time?

A. No, sir.

Q. Was there anyone with the automobile?

A. Sir?

Q. Was there anyone with the automobile? It was just sitting on the street in other words?

A. Well, I am trying to remember if there was somebody there. I couldn't swear that there was right at the time, except myself.

Q. The car was open, was it?

A. I really can't say.

Q. Did you make an inspection of it at that time?

A. No, sir; I did not.

Q. In other words, this was just a car about which you had information sitting on the street?

A. It was a car which we had a complaint on sitting on the street.

Q. Was it unattended, if you recall, at the time you first came to it?

A. I just said I don't remember.

[156] Q. And approximately what time was this?

A. I said in the early morning hours. I am not real sure of the time.

Q. That would have been in the nature of 1:00 o'clock or 2:00 o'clock?

A. I really can't testify to the time, sir. I don't remember.

Q. Well, I am only trying to see whether or not it was close to 10:00 o'clock or close to 1:00 o'clock. When you say "early morning," I don't know what that means. To the best that you can recall.

A. It was approximately midnight, shortly after midnight.

Q. And you next saw it where?

A. In back of the Police Department in the City of Lebanon.

Q. How did it get there?

A. By wrecker.

Q. Were you there?

A. When the car was dropped?

Q. When it was picked up.

A. No, sir; I was not.

Q. What time did it get to the City Police Department?

A. Once again, I'd have to say the early [157] morning hours. I have no specific time.

Q. Did you yourself at that time make an inspection to see whether the car was open or locked or anything?

A. No, sir. The first contact I had with that vehicle was after I obtained a search warrant.

Q. I see. In order to obtain that search warrant you filed a particular affidavit for a search warrant; is that right, sir?

A. Yes, sir; that is correct.

Q. I show you what's been introduced as Plaintiff's Exhibit number PX-4, which is a certified copy of a particular affidavit filed with the Lebanon Municipal Court which bears a signature.

A. Yes, sir; that seems to be it.

Q. Is that your signature, sir?

A. That is my signature, yes.

Q. And the only contact you had with that automobile, as you suggested, was after the issuance of this warrant?

A. That's the first time that I personally came in contact with the vehicle. I had knowledge of it before this but not any personal contact.

MR. McCROOM: Nothing further, your Honor.

CROSS-EXAMINATION

* * * *

Toller—Cross

[161] automobile in question.

Q. And did that information include as to the location that this automobile was in in relation to the Post Office when this man was apprehended in the back seat of this car?

A. Yes. We knew where the car was.

Q. And at that time you then ordered this particular automobile that this man was found in near the Post Office, you then ordered it impounded; is that what happened?

A. No, sir; if I could explain.

Q. Sure, explain. Go ahead.

A. At the time that I arrived at the Post Office the only two gentlemen there were the two in the back seat of the car. This did not include Mr. Livesay. I believe it was during the time we actually made a physical

search of the Post Office property that Mr. Livesay was found by one of our officers in this particular vehicle.

Now, the first contact I had with Mr. Livesay—I can't recall whether he was brought by the Post Office and then on to the Police Station or not. The first I can really remember is at the Police Department, and I believe that's the first contact I had with him.

Q. But the car that he was in was ordered impounded; is that correct?

Toller—Cross-Redirect

[162] A. That's right. I done it myself.

Q. And it was ordered impounded by you?

A. Yes, sir.

Q. Did you yourself search this automobile the next day?

A. Yes, sir; I did.

Q. And this search of the automobile that you made, was this prior to or was this after you had obtained the particular search warrant that Mr. McCroom just showed you before?

A. Yes, sir. We made great efforts to see that this was done. We were being very particular about it.

Q. I take it then arrest warrants and charges had already been filed against Mr. Livesay before this search warrant was issued?

A. Yes, sir; the day before.

Q. And before the—

A. Yes, sir; it was.

Q. Before the automobile was searched?

MR. NADEL: That's all I have.

REDIRECT EXAMINATION

BY MR. McCROOM:

Q. You did not sign the affidavit for the—Well, strike that.

You did not participate in any way in the

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Toller—Cross

[165] charge?

A. I believe our prosecutor would be in charge of the prosecution.

Q. Well, so far as the Police Department itself was concerned, are you the person there who was running it or responsible for it?

A. I had to do with the investigation of this.

Q. O. K. And they were both charged with attempted burglary or burglary; is that correct?

A. I believe Mr. Livesay was charged with burglary.

Q. And how about Mr. Edwards?

A. Burglary also.

Q. O. K. Are those prosecutions still pending?

MR. NADEL: Objection.

MR. TRAPP: Objection, your Honor.

THE COURT: Sustained.

Q. Well, let's go back and maybe we will ask the question again.

A. All right, sir.

THE COURT: Evidently they are not.

MR. NADEL: I think they are.

Q. After they were taken into custody it's the procedure to have their clothing removed, is it not?

A. Yes, sir; it is.

[166] Q. And their clothing is kept in some manner or another so long as they remain in custody; is that correct?

A. Now, you mean are we generalizing now or are we going for these two subjects?

Q. Let's talk about Mr. Edwards and Mr. Livesay.

A. Their clothing was removed from them; yes, sir, or they removed it for us on our request.

Q. You asked them to do it?

A. Yes, sir.

Q. You wanted their clothing?

A. Yes, sir.

Q. And you were going to get it whether or not they let you have it or not; is that correct?

MR. NADEL: Objection.

THE COURT: Well, they were in the jail.

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MR. SMITH: I will withdraw the question, your Honor.

THE COURT: They were in the jail and the head police officer in the area says he wants their clothes. That's the situation. So beyond that isn't it argumentative?

MR. SMITH: It is, your Honor. I withdraw it.

THE COURT: Without much argument, I suppose if I am in jail and the head of the Police Department says, "I want your clothes," I know what

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SELECTIONS FROM THE TRIAL TRANSCRIPT

Ashley—Direct

[189] the intersection of West Main and Broadway, right on the same side of the street as the Golden Lamb is.

I pulled out, was going in this general direction and turned also as they turned and went west on West Main Street. When I had reached the alley again they were approximately at this position (indicating). I received a radio dispatch from our dispatcher that there had been—

THE COURT: It will be the same thing; just say what you did after the dispatch.

MR. SMITH: If the Court please, I have no objection to his testimony, what that radio dispatch was.

THE COURT: All right. Do you have any?

MR. McCROOM: None at all, your Honor.

THE COURT: All right. Go ahead then, Officer. Sorry.

A. (Continued.) I received a dispatch that there had been a burglar alarm sounded at the Post Office. Seeing these men in this position and the circumstance, I told them to enter the cruiser here (indicating), which they did.

Then I went on down to the intersection of South Street, turned south on South Byeamore, turned east on South Street. I came to the intersection of South Broadway, turned north on South Broadway and I parked—excuse me—my cruiser in front of the Post Office with these two subjects [140] in the vehicle.

There was also another officer there at this time. He went to the front of the Post Office. He was in this area. I went along this retaining wall also and back in this area and observed a window that at this time, all I could tell, a window that was open; screen also on the window was open at this time, just at a first glance, and it was the second window from the rear of the building on the north side.

Q. If you would, take a look at Plaintiff's Exhibit number 1 and tell us if you can what it is and where that window was that you were just talking about.

A. This is a diagram of the Post Office in Lebanon. I went up—There is a wall here. There is a wall—I think it runs back, comes up from the sidewalk and it runs along this fence. I went back to this point and observed the window here being open (indicating).

Q. O. K. Now, going back to when you first saw the men on the street, I believe you testified that you saw them first here on South Broadway?

A. Yes.

Q. Did you see any other persons on South Broadway at that time?

A. No, I did not.

Q. About what time of night was this when you [141] first saw them?

A. I'd say roughly it was after 11:00. It was 11:00 or a little after. I am not sure exactly of the time.

Q. Do you know at about what time you picked these men up?

A. I'd say it was after 11:05, 11:10 maybe.

Q. O. K. Would you look around the courtroom and see if you see any of the men that you picked up at this corner on that particular night?

A. I see one.

Q. And would you go over and point him out for the ladies and gentlemen of the jury?

THE DEFENDANT EDWARDS: I will stand up for him.

A. This gentleman.

MR. WINKLER: May the record show that the man he picked out was Eugene Howard Edwards?

THE COURT: Yes, sir.

Q. Now, will you continue your description of your investigation?

A. If I could have the other exhibit?

Q. (Handing.)

A. At this point other officers had arrived at the scene. I stayed in this general area. I crossed this fence, stayed in this area near the open window, watching [142] this window. Other officers had gone inside.

At this window, on the regular portion of the window—it's a wood window. At the bottom of the window there

were what appeared to be pry marks, indentation of a pry tool. At the top of the window there is a regular latch. This had been bent downward.

The window looked to have been forced up and there were paint chippings on the sill or on the windowsill. Also the screen was canted inward. If this would have been the screen, it would appear to be in, oh, about this much or about a 35, 40-degree angle, approximately.

The screen was—it's a mesh screen, and where the mesh met the edge of the screen, these had been broken. There is bars that go up into the ceiling this way (indicating). There is a latch. These had been bent and they were bent outward, the appearance that this had been forced open.

On the floor directly below this window there was a coffeepot and some type of liquid was lying on the floor. Also on the inner sill there was a liquid stains on this inner sill.

Q. O. K. Now, I believe you testified that when you came to the Post Office you came down this alley behind the Post Office; is that correct?

A. Yes. This would show the back of the

* * * *

[145] with normal police markings upon it. Also our police vehicles have the red light on the top of the vehicle.

Q. Will you describe this light on the top of it, what it looks like?

A. It's, oh, it's just a light. It's a regular red light, stands, oh, about a foot, a little over a foot high, and it comes up and is rounded at the top.

Q. What's it made out of?

A. It's made out of glass, and then a chrome base on it.

Q. And can you tell us, if you can, how high that dome extends from the ground?

A. It would be my height or slightly taller. I am approximately five eleven, so it would have been about six foot at the top.

Q. O. K. Would you at this time return to the witness stand, please?

Sergeant Ashley, at this time I hand you what has been marked—

MR. McCROOM: May we see them, counsel?

MR. WINKLER: (Handing.) I would like to strike the first portion of that last question.

Q. Now, Patrolman Ashley, after you made observations regarding this window back here, did you have occasion to conduct any other investigation in the area of [146] the Post Office that night?

A. Yes. I was advised by the senior officer to make notes, to photograph and to tag, obtain evidence, bag the evidence and take it to the police station.

Q. Now, when you say "evidence," what are you referring to?

A. Objects at the scene of the crime which we would believe that were instrumental in the commission of the crime.

Q. Now, what kind of objects are you referring to and where did you find them?

A. In my capacity, I found what appeared or what I thought was a pry bar—it's approximately a foot long—lying near the edge of the building, in front of the building.

Q. Could you come down here and explain where you found that?

A. I found the pry bar in approximately this position (indicating), lying along here; a pair of gloves in front of the wall here (indicating) and another pair of gloves right here. All of these items were photographed, then tagged, bagged and then taken to the Police Department by myself.

Q. Were they photographed in place?

A. Yes, they were photographed before they were [147] touched.

Q. Now, would you tell us, if you can, referring back to the time when you first saw Mr. Edwards on the sidewalk here, could you tell us how far you found those items from where you saw Mr. Edwards?

A. The items were found in this area (indicating). Mr. Edwards was found—I saw him approximately here.

This would be a distance of, oh, nine to ten feet to this point, maybe 12 feet, 15 feet to this point.

Q. All right. Now, will you return to the witness stand again?

Now, Mr. Ashley, I hand you what have been marked Plaintiff's Exhibits number 8, 4, 5, 6 and 7 for identification. I ask you to examine them and tell us, if you can, what they represent.

A. Plaintiff's Exhibit number 8 is a photograph of the window, the second from the rear on the north side that was found to be open. It shows the screen with the mesh being torn or broken away from the metal frame. It shows the paint chips on the outer sill, on the inner sill and on the portion in between of the window.

Plaintiff's Exhibit number 4 is a photograph of the window, the bottom of the actual window. It shows the pry marks in the bottom of this window. It also shows the screen being open at the lock, the point of the lock, and [148] again the mesh being torn; and if you would examine the photograph carefully, you can see the lockers in the back which were in the particular room, looks like a coffee break room.

Q. Who took those photographs?

A. I took these photographs. I also processed them, developed them.

Q. When did you take those photographs?

A. Shortly after the burglary had been committed, approximately midnight.

Q. Are the photographs shown in Plaintiff's Exhibits 8 and 4 fair and accurate representations of the window scene as you saw it—

A. Yes, they are.

Q. —on the night of May 31st, 1970?

A. Yes, they are.

Q. Would you go to the next photograph, please?

A. Plaintiff's Exhibit number 6 shows the pry bar. This was found, as I said, along the front of the building, which would be the east side.

Plaintiff's Exhibit number 6 shows a pair of rubberized, it looks, what were rubberized gloves, found near the bushes at the northern corner of the Post Office.

Plaintiff's Exhibit number 7 shows a pair of cotton gloves found in front of the wall between the

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[158] A. No, I do not. It's possible they could.

Q. I take it from your testimony that you just don't know what happened to them?

A. That's correct.

Q. I believe you said that you took Mr. Edwards and another man into custody that night, that you took them back to the Post Office?

A. Yes, I did.

Q. Now, what, if anything, did you do regarding these two men after they were at the Post Office?

A. They were still seated in the vehicle at this time. There were other officers around the vehicle. Shortly afterwards the captain of police in our department arrived and instructed me to take the two subjects, one being Mr. Edwards, that were in my vehicle to the Police Department. This was done. Both subjects were booked in and the property was taken in bags and placed in a safe place, and they were placed in separate cells in our cell area.

Q. What, if anything, separates these cells?

A. The cells are constructed of steel. The whole cell is steel, and it's made of, I believe, approximately one-quarter inch sheet steel, the sides, the back, the floor, part of the front side, the top, except for a small ventilation area, and the front is made of a steel door with

* * * *

Ashley—Cross

[172] Q. O. K. The exhibit number marker, the marker that identifies this as Plaintiff's Exhibit number 4, should be at the top of the picture as you look at it to have the picture properly oriented; right?

A. Yes, I would believe so on this picture.

Q. Yes, right. I think you indicated that you took these pictures about an hour or so after you got there. You took the pictures about 12:00 o'clock, I think you said?

A. Yes.

Q. And I assume that nothing had been disturbed in the area around the window at the time you took the pictures?

A. No, there hadn't. There had been a policeman watching so that this would not happen.

Q. So, so far as you know, and because there was a police officer there seeing that it remained that way, these pictures show the scene undisturbed by any kind of police activity; is that correct?

A. To the best of my knowledge, yes.

Q. O. K. Now, calling your attention to Plaintiff's Exhibit number 8, this indicates, does it not, the mesh screen on the window that was torn open in some way or other with the one side of that screen partially opened; is that correct?

A. Yes.

[178] Q. O. K. And there are little black marks or what appear on the photograph to be black marks along the windowsill; is that correct?

A. Yes.

Q. Are those the paint chips that you talked about?

A. Those were the paint chips that I saw.

Q. O. K. And this is an accurate representation of the sill with the paint chips on it as you saw it and before anything was removed from the sill; is that correct?

A. To the best of my knowledge, yes.

Q. O. K., you may go back to the stand, Officer.

In your best estimate how high is that windowsill from the ground level?

A. If I recall, it's only four—it's not very high off the ground. I can't give you exact measurement, but it's not very high at all. It's quite close to the ground.

Q. How wide is the window, the frame of the window?

A. Again, I couldn't give you an exact measurement. I didn't measure the window. The window is a two-pane window. I believe the Post Office would have exact measurements if you wish. I would say three and a half feet, offhand.

* * * *

Stratton—Direct

[222] Q. All right. Now, directing your attention to that date, May 31st, 1970 at approximately 10:45 p.m. in the evening, did you have occasion to conduct an investigation in the area around the Lebanon, Ohio Post Office?

A. Yes, sir.

Q. Would you describe for the ladies and gentlemen of the jury the extent of that investigation?

A. We received a phone call or a radio dispatch to go to that location.

MR. McCROOM: Objection, your Honor, to the substance of that call.

THE COURT: O. K. All right, to the extent that the testimony is that the officer received a radio dispatch and thereafter went to the location, the testimony will stand. To the extent that the testimony has any indication of what was in the dispatch, the jury will please disregard it.

Q. Would you continue, Patrolman Stratton, and confine your testimony to what you did?

A. Could I come to the board?

Q. (Questioning look.)

A. Could I come to the board and describe?

THE COURT: Sure.

Q. Yes, you may.

A. Myself and Patrolman Ashley were dispatched to [223] the Post Office here on Broadway, on South Broadway. At this time I was in this area (indicating). We had a parking complaint here at the meat market. I was returning from that complaint and went past this car that we had a suspicious car report on.

MR. McCROOM: Objection, your Honor; move it be stricken.

Q. I can't hear. What was the testimony?

(Record read by the reporter.)

THE COURT: Very well. That part of the answer, the jury will please disregard that. The witness may testify to what he saw and what he did and not what anybody told him; and if somebody says that somebody told him something, just automatically forget it. Go ahead.

A. (Continued.) I went to this area here (indicating).

At that time I was dispatched back to the Post Office. I went back down South Sycamore Street, around—

Q. Did you do anything in that area when you were coming down South Sycamore Street?

A. Yes, sir. I flashed the lights on this particular car.

Q. What lights do you mean?

A. The cruiser light, the spotlight on the driver's side of the cruiser.

[224] Q. And what kind of automobile was this?

A. It was a tan Plymouth.

Q. Do you remember the license plate number on it by any chance?

A. Yes, sir; 8120-RS.

Q. All right. And what did you do after you flashed your spotlight into the car?

A. I continued on past the car, going to this intersection, South Sycamore and South Street, turned here on South Street, continued on over to South Broadway, went up South Broadway and stopped the cruiser right here in this area (indicating).

Q. Now, when you flashed your light on that automobile did you see anyone in the car?

A. No, sir.

Q. Do you know approximately what time of night that was?

A. No, sir. I would say approximately two minutes after we got the dispatch.

Q. All right. Will you continue then?

A. I got out of the cruiser and I went across to the Post Office, to the lobby. I went in the lobby area, that part of the Post Office being unlocked, went into the lobby. The Post Office in this area was secure. I came back out on the steps, met another officer. He advised me that [225] the Post Office had been—

Q. Try to confine your testimony to what you did and what you saw.

A. I came out here and went on around here to this driveway and on back here (indicating).

Q. What did you do back there?

A. I observed the rear end of the Post Office for approximately five minutes.

Q. And then what, if anything, did you do after that?

A. I was instructed to go back and check the car out again.

Q. All right.

A. Right here is an alley. I walked down this alley to South Street, walked on the sidewalk along South Street to Sycamore Street, got approximately in this area right here and stood behind a tree for approximately 30 seconds and observed the car. I then went on up to the car on the driver's side, the rear door of the car, and I looked into the car.

Q. Did you see anything?

A. Yes, sir. In the back seat there was an individual laying in the back seat.

Q. And then what, if anything, did you do after that?

[226] A. I opened the car door and asked him to step out of the car.

Q. Then what happened then?

A. He stepped out of the car. I asked him what his name was, what he was doing there.

Q. Did he make any explanation?

MR. McCROOM: I will object, your Honor.

THE COURT: What was the question?

MR. McCROOM: "Did he make any explanation"?

THE COURT: Sustained.

Q. All right. Go ahead and proceed.

A. He did give me his name.

MR. McCROOM: Object again, your Honor.

THE COURT: Sustained. What happened after whatever he said, what happened next?

A. (Continued.) Well, he was placed under arrest at that time, suspicious person. I searched him, handcuffed him and proceeded back down to this area towards South Street, on down South Street, and met a cruiser here (indicating), another cruiser. An officer in this area right here put him in the car and took him to the police station.

Q. Now, do you see that man in the courtroom today?

A. Yes, sir. He is sitting right there.

Q. The man with the beard?

[227] A. Yes, sir.

MR. WINKLER: May the record show that he has identified the defendant William Livesay?

THE COURT: Yes, it so may.

Q. Now, at the time that you arrested Mr. Livesay, did you search the automobile?

A. Yes.

Q. Don't say anything about anything you might have taken.

A. Yes, I did.

Q. And what, if anything, did you find in the automobile?

MR. McCROOM: Object, your Honor.

THE COURT: Overruled.

A. I found a hammer in the front seat of the car. It was on the passenger side of the car.

Q. Mr. Stratton, I hand you what has been marked Plaintiff's Exhibit number 9 for identification. Will you please examine that and, if you can, tell the members of the jury what that is?

A. It is a roofing tool. It's explained to me as used in the roofing business.

Q. How do you know that's used in the roofing business?

A. The defendant at that time stated this was a

* * * *

Stratton—Direct—Cross

[230] Q. All right. What happened after he was taken to the police station.

A. At that time he was placed in a cell.

Q. Was he placed in a cell by himself?

A. Yes, sir.

Q. How many cells do they have in the Lebanon jail?

A. There are four cells altogether, three male and one female.

MR. WINKLER: I have no further questions of this witness, your Honor.

CROSS-EXAMINATION

BY MR. McCROOM:

Q. Patrolman Stratton, how long have you been employed by the Lebanon Police Department?

A. I am no longer employed at the Lebanon Police Department.

Q. (Questioning look.)

A. I was employed there for a year and a half.

Q. For a year and a half?

A. Yes, sir.

Q. How long had you been employed on May the 31st of 1970?

A. Just over a year.

Q. How long had you lived in Lebanon, Ohio on

* * * *

Molnar—Direct

[262] A. Well, that it was a light gray soil with nothing pertinent at the time of my examination.

Q. Now, Mr. Molnar, did you have an occasion to examine some clothing?

A. Yes, I did.

Q. Do you recall how much clothing was involved?

A. Well, I think there was about 10 sacks altogether from three individuals of clothing.

MR. TRAPP: Your Honor, we have several items here I would like to present for identification to the witness. Would it be all right if I presented one at a time or would you rather—

THE COURT: Either way you wish.

Q. Mr. Molnar, I am going to hand you what is marked as Plaintiff's Exhibit 13-A, 13-B and 13-C.

A. Is it all right to open it?

Q. Yes, go right ahead.

A. Yes, sir; I have seen these objects before.

Q. Now, can you tell the ladies and gentlemen of the jury what they are?

A. They are a blue shirt and trousers and a pair of shoes that I received from Captain Toller of the Lebanon Police Department.

Q. How do you know you received those from Captain Toller from the Lebanon Police Department?

[263] A. The paper sacks bear my case number of 70-11937, plus my initials are on each item, and they bear the name of the individual that was on it at the time I received it.

Q. Do you know the name of the individual on those?

A. Yes, sir. The person's name is Livesay.

Q. Now, Mr. Molnar, I am going to hand you what is marked as Plaintiff's Exhibit 14-A, 14-B, 14-C, 14-D. Take your time.

A. Yes, sir; I have seen these objects before.

Q. Can you identify those items marked as Plaintiff's Exhibit 14-A, B, C and D?

A. Yes, I can. These are a group of men's clothing that I received from Captain Toller of the Lebanon Police Department.

Q. And how do you know you received those from Captain Toller of the Lebanon Police Department?

A. These are all packaged in individual sacks in which I received them and on which I placed my Bureau case number of 70-11987. I placed my initials on each of the items in the exhibit and it bears the name of the individual that was on the sack at the time I received it.

Q. What's the name of the individual on those four items?

A. A person named Edwards.

(264) Q. Now, Mr. Molnar, did you examine each and every one of those items? By "those items," I mean Plaintiff's Exhibit 18-A, B and C and 14-A, B, C and D.

A. Yes, I did.

Q. And how did you examine them?

A. These were a visual and a microscopic examination conducted by opening the sacks individually on a large table, on a large piece of clean brown wrapping paper. Each item of clothing was opened, examined for any visible traces that might be on it and then it was swept and brushed for debris and the debris was collected.

Q. Mr. Molnar, will you explain to the Court first what you mean by the visual examination?

A. Well, a visual is just a looking over of the item by using eyesight, looking for anything particularly abnormal about the item.

Q. And did you say you brushed and swept this clothing?

A. Yes. Then after that then the clothing is brushed and swept and shaken for any possible loose debris or trace material that might be on the clothing.

Q. And how is this done?

A. This is done over the large piece of paper, by using a brush, a whisk broom, and also vacuuming with a small vacuum cleaner and a prepared trap.

(265) Q. Now, did you take each item individually and do this?

A. I did it with each group of clothing. These four sacks and these three sacks were done as one exhibit.

Q. Did you find any debris?

A. Yes, I did.

Q. Did you find any sweepings?

A. Yes, there were sweepings.

Q. And what did these sweepings consist of?

A. The sweepings consisted of some fine sand and soil, some lint, fibers, which are compatible with the fibers of the clothing. These are almost always found. And then in it I found a number of paint flakes in both sets of sweepings.

Q. Did you examine each and every one of these sweepings?

A. Yes, I did.

Q. How did you examine these sweepings?

A. The sweepings that were on the paper and from the sweater were collected and put together in a common exhibit or a petri dish of that particular set of clothing. This was placed in a clean glass and then under a microscope, a stereoscopic microscope, this was searched for particular matter, looking and identifying the composition of these sweepings.

(266) Q. Did you find any soil?

A. Only some fine—some sand particles; no soil or earth particles that I could identify as such.

Q. Now, Mr. Molnar, you said that you conducted a visual and a microscopic examination of these clothing?

A. Yes.

Q. The debris of sweeping from these clothings; is that correct?

A. Yes.

Q. Now, microscopically why did you examine these sweepings?

A. Well, here again, in order—looking for trace material, sometimes to detect trace materials, it requires a

microscopic examination to detect the presence of small particulate matter that is of the size such as small paint chips, grains of sand, pieces of grass, lint and fiber and so forth and so on.

Q. Now, what did you do with the sweepings?

A. After my examination the sweepings were packaged into bags and identified as to being a certain specimen number as being the sweepings connected with the clothing on—one specimen of clothing and the other with the other specimen of clothing.

Q. Do you recall how many bags you made?

A. Three, I made three plastic bags of sweepings.

(207) Q. Mr. Molnar, I am going to hand you what is marked as Plaintiff's Exhibit 28-A, 28-B and 28-C. Will you tell the ladies and gentlemen of the jury just what those are?

A. Exhibits 28-A, B and C are the three plastic bags into which I placed the sweepings from the three sets of clothing that I examined in connection with this matter.

Q. How do you know you put the sweepings from the three sets of clothing in these three bags?

A. I have within each bag placed a small piece of paper upon which I have printed the debris from the clothing of the individuals named on the three sets of clothing that I examined, plus my initials are on there and the specimen.

Q. The initials and the what are on that?

A. The initials and the specimen number on it.

Q. Now, did you make a comparison of the paint samples that were brought to you by Captain Toller with the sweepings taken from those clothings?

A. Yes, I did.

Q. And what were your findings?

A. I found that in the debris from the clothing, I found particles and chips of green paint, green over a blue-gray paint and some green over green, that is two-layer green (208) paint, that in all three specimens.

Q. Now, Mr. Molnar, do you have an opinion within a reasonable scientific certainty that the paint chips from the clothing of Livesay and Edwards and the paint samples taken from the windowsill and from the screen of the Post Office in Lebanon, Ohio originated from the same source?

MR. SMITH: Objection, your Honor, may the Court please. Now, your Honor please, the objection is to the form of the question in that it presumes where this came from.

MR. TRAPP: Your Honor, he has testified these were sweepings brought to him.

THE COURT: Very well. I think the question maybe comes down to this. You have testified in respect of some sweepings that were taken from what's been marked here as identification 18, which sweepings were taken from bags, which bags when handed to you bore the name Livesay; and you have also testified in respect of some sweepings taken from what's been marked 14, and the clothing that's been in bags marked 14, those bags also bear the name Edwards, and you have also testified that you compared those sweepings with what's been identified as sweepings taken from an exhibit marked 18; [269] correct?

THE WITNESS: I can't recall the exhibit number.

THE COURT: Yes. The problem here is really mechanical in that the problem is defined as a common denominator. But somebody named Toller brought you some clothing in some bags marked Livesay and they brought you some clothing in some bags marked Edwards and you have identified those, and that's your testimony. He also brought you—Well, let's take first. You took sweepings from each of those clothes?

THE WITNESS: Yeah.

THE COURT: O. K. Then you testified that Toller also brought you what he said at the time were paint samples which he took from someplace. Now, you have examined the paint samples and you have also examined the sweepings; right?

THE WITNESS: Yes, sir.

THE COURT: Now, the question is first: Do you have an opinion based upon reasonable scientific probability on whether or not what was in the sweepings was exactly the same as what was in the sample?

THE WITNESS: That's what I understand the [270] question; yes, sir.

THE COURT: O. K. You can go ahead and answer the question over the objection.

A. Yes, sir; I do.

Q. And what is that opinion?

A. It's my opinion, based on my comparison and examination of the paints that I received from Captain Toller and the paints that I found in the two sets of clothing, that the paints found on the clothing are the same color of green paint, the same order of layering of green over blue-gray paint. They are the same color and texture and are so much alike that they can have originated from the same source.

THE COURT: Well now, wait a minute. The opinion is "so much alike that they could have originated from the same source." The question is—and you are the only person in this courtroom to whom this question could be addressed. We can't deal in "could's" or we can't deal in "may's" or we can't deal in "probable's." All we can deal in is reasonable scientific certainty.

Now, is this opinion in the field of reasonable scientific certainty or is it may or could? This is not critical.

THE WITNESS: I understand the problem. Within [271] the limits of the microscopic examination of these small particles of paint, all I can say is that the paints that I found in the sweepings and the paints are exactly alike to me as far as my examination can go.

THE COURT: O. K. Then we will have to say this to the jury. The jury will please disregard the expression of opinion, not take that into consideration. However, counsel may pursue the identity in what respects this witness found there to be similarity and dissimilarity. You can pursue the fact or you can pursue his expertise in what he found, what was alike and what was dislike.

Q. Mr. Molnar, what were the similarities of the paint samples that you took from the clothing of Mr. Livesay and Edwards when you compared them with the paint samples that were taken—that were supplied to you by Captain Toller?

A. The similarities were that in both sets of paints the paints were green; they were of the same color. Some of the paints in both sets were of green, were over the same color of blue-green—or blue-gray paint. Some of the paint from the clothing and some of the paint from the sample from Captain Toller were two-layered green of

the same color, and the texture of the broken edges of the pieces were the [272] same in both sets of samples.

Q. Thank you, Mr. Molnar. Now, Mr. Molnar, did you report your findings, make a written report of these findings?

A. Yes, I did.

Q. And do you recall how many reports you made? Did you make more than one report?

A. Yes, I wrote a preliminary report on a part of the examination on the 14th, I believe.

Q. Mr. Molnar, I am going to hand you what is marked as Plaintiff's Exhibit number 86 for identification. (Showing documents to counsel.)

Mr. Molnar, you said you made two reports; is that correct; a preliminary report—

A. Yes, sir.

Q. —and did you make another report?

A. Yes, I did.

Q. Was that your final report?

A. Yes. The final report was the report of all the examination. The preliminary report involves examination of the paint samples with one set of clothing. The other, supplementary report, includes that finding plus the examination of the other two.

Q. Of the other two clothing?

A. Yes.

* * * *

Molnar—Cross

[286] person, but for each set of clothing I used one piece of paper and collected the debris. As it came off the shirt it was shook to the center and then dumped into the container, and then the second item of clothing was placed on it.

Q. O. K. Now, with respect to the Edwards shoes, did you find any debris or paint chips on those shoes?

A. No, I didn't find any on the shoes.

Q. Did you find any on the shirt?

A. On the shirt and the trousers, yes.

Q. On the shirt and the trousers. Any on the sweater?

A. Yes, I think on the sweater there was.

Q. So you found it on the shirt and on the sweater and on the trousers?

A. Yes.

Q. Some kind of debris?

A. Yes.

Q. And then you examined that and you compared it to what Captain Toller had given you that he identified as some paint chips; right?

A. Yes.

Q. And in that batch that you got out of the shirt and the pants and the sweater from Edwards you found some paint chips that matched microscopically in some

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Toller—Direct

[882] around and then went to the Police Department.

Q. Now, Captain Toller, while you are on the witness stand, you said you came into a room on the northwest side of the building; is that correct?

A. Yes, sir.

Q. Would you point to where that area is?

A. It is the room designated "swing room." I don't know what a "swing" is, but this is the room right here.

Q. Can you describe what's in that room?

A. There was a coke machine, a table, it seemed—in this area. It seemed to be a utility type room for breaks and things. That would be my guess.

Q. Where was this window that you said was open?

A. It was the second window, right here (indicating).

Q. Right about here (indicating)?

A. (Nodding.)

Q. Is this where you also observed the screen?

A. Yes, sir; it is.

Q. O. K. You may return to the witness stand. Thank you.

Now, just what did you observe about this screen?

A. It had been forced in. It was a screen that [888] folded from the side of the window to the center and a lock in the center, and this screen had been forced at the bottom.

Q. Approximately how large is that screen?

A. Well, I would say approximately five feet high and possibly 24 inches wide a half section, so probably be four by five, something of this nature. I am not sure of these measurements now.

Q. And you say this screen was forced in. Can you be a little more specific and tell us what you mean by "forced in"?

A. Where the screen joined in the center of the window, the one screen had been forced in. One side of this screen had been forced in.

Q. Was there some damage to the—

A. Yes, sir; there was.

Q. What kind of damage was this?

A. It appeared to be damage made forcing the screen open.

Q. Was there a hole, a slit?

A. The screen itself is a heavy—As near as I can describe it, would be the Cycloee type fencing, and where it joins the frame had been broken away in three or four places.

Q. Thank you. Now, you said you conducted a search of the area; is that correct?

[884] A. Yes, sir.

Q. After you concluded your search, what did you do then?

A. Looked around outside very briefly and went to the Police Department at that time.

Q. Approximately what time did you return to the police station?

A. About midnight. I don't know the time exactly.

Q. Did you bring anyone with you or did anyone accompany you?

A. No, sir. I drove my own personal car to the department.

Q. Do you recall if anybody was brought to the police station?

A. Yes, sir; there was.

Q. And who were these people that were brought?

A. Mr. Livesay and Mr. Edwards and one other subject.

Q. Do you recall who brought them to the police office?

A. Sergeant Ashley brought Mr. Edwards and one other subject, and I believe Patrolman Stratton brought Mr. Livesay.

Q. Now, after they were brought to the police [885] station what was done with these people?

A. There were placed in individual cells at this time.

Q. How many cells do you have in the jail there?

A. Four.

Q. Four individual cells?

A. Yes, sir.

Q. Would you briefly describe what these cells are like?

A. They are solid metal with the exception of the doorway, and just a normal jail would be about all I could say.

Q. After these people were incarcerated what did you do?

A. After a short time they were interviewed individually.

Q. And where was this interview conducted?

A. In my office.

Q. Did anyone assist you in that interview?

A. Yes, sir.

Q. And who was that person?

A. Lieutenant J. D. Saylors of our Department.

Q. Now, what, if anything, did you ask these people during the interview? Or, what did you do? Excuse me.

* * * *

[889] men who were in his office on the evening of May the 31st, 1970.

THE COURT: It may so.

Q. Now, what did you do as far as this interview was concerned, Captain? Did you conduct a further interview?

MR. SMITH: Your Honor, if the Court please, we object at this time. I don't know what the point of the question is, or I don't know what he is asking for, your Honor, and it may be—

THE COURT: Does counsel intend to elicit from this witness a statement, oral statement, attributed to either defendant?

MR. TRAPP: No, your Honor. I am just trying to show the sequence of events.

THE COURT: All right. Go ahead then.

Q. What did you do after you saw these two men, conducted the two men in your office?

A. After the interview?

Q. Yes.

A. They were placed back in their cells.

Q. Were they placed in individual cells?

A. Yes, sir.

Q. Now, Captain Toller, what did you do for the remainder of the evening?

[840] A. I had contact with Mr. Brawner, Agent Brawner, and then I went home and got some sleep.

Q. Now, who is Agent Brawner?

A. The gentleman on the end there (indicating).

Q. When you say "Agent Brawner," agent for what?

A. Postal Department.

Q. Postal Department?

A. Yes.

Q. All right. Now, I am going to direct your attention to June the 1st of the year 1970. What, if anything, did you do that day?

A. Well, in regards to this particular case, we started where we had left off the night before. Clothing was obtained for these subjects, new clothing, and the clothing was taken away and bagged for transportation to the crime lab.

Q. Where did you purchase this clothing?

A. In a department store named Kaufman's in Lebanon.

Q. What kind of clothing did you furnish these men?

A. Overall pants and T-shirts.

Q. Now, Captain Toller, did you bring each defendant to your office on that morning in question?

A. They were brought to my office at my [841] direction.

Q. And what was the purpose of bringing these men to your office?

A. To take their clothing.

Q. And did you remove their clothing?

A. They removed their clothing for us at our request.

Q. And who else was in your office?

A. Lieutenant Sailors.

Q. Did you bring each defendant separately?

A. Yes, sir; we did.

Q. And what did you do after each defendant removed his clothing?

A. The clothing was placed—each individual item was placed in a separate bag. It was initialed and identified by the subject the clothing came from, date and what the article was.

Q. Was it further identified—Oh, thank you. Captain Toller, I am going to hand you what is marked as Plaintiff's Exhibit 18-A, 18-B and 18-C. Sir, I am going to ask you to identify each of those three items.

MR. SMITH: Your Honor, if the Court please, in the interest of time, we will stipulate that Exhibits 14-A, B, C and D is the clothing that Captain Toller took from Mr. Edwards on that [842] morning.

THE COURT: Very well. Thank you, sir.

MR. McCROOM: Join in that stipulation, your Honor.

THE COURT: Very well, and 18-A, B, C, 14-A, B, C and D are admitted.

MR. TRAPP: Thank you, your Honor.

(Livesay's clothing and Edwards' clothing heretofore marked Plaintiff's Exhibits 18-A, 18-B, 18-C and 14-A, 14-B, 14-C and 14-D for identification were offered and received in evidence and are made a part of this record.)

Q. Captain Toller, what did you do with this clothing after you initialed it, marked it, tagged it, identified it?

A. It was stored in my office.

Q. Approximately how long?

A. On the 8th day of June I believe it was I transported this to the State crime lab at London, myself.

Q. Did you do this by yourself or in the company of another person?

A. I hand-carried this personally.

Q. And to whom did you deliver this?

A. This was delivered to the receiving clerk at BCI, the State crime lab.

[343] Q. When you say BCI, would you tell the ladies and gentlemen of the jury what that is?

A. The Bureau of Criminal Identification.

Q. And what was the purpose of taking it there?

A. To be checked as evidence.

Q. Now, Captain Toller, I am going to ask you what, if anything else, did you do on June the 1st of the year 1970?

A. I collected paint samples from the point of entry at the Post Office where a burglary had been attempted.

Q. And where was this?

A. This was at the window we discussed on the chart. There were paint samples laying on the outer sill, the inner sill. I also collected some scrapings from the screen itself that had been forced, and I took a sample of soil underneath the window.

Q. And what did you do with these samples of paint that you took from the inner sill, the outer sill, the window that was open and the scrapings from the screen?

A. These samples were collected in a small plastic bag, each separately, and was identified by placing a slip of paper inside each one, giving the location, date and my initials. These slips were in my own handwriting.

Q. You said you collected a soil sample. Where did you collect this soil sample?

A. Directly underneath the window at the point of

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Toller—Cross—Redirect

[365] Q. So far as you know, nobody took it up?

A. No.

Q. And you didn't take it?

A. No.

Q. Did you take the other pair of gloves that are no longer available?

A. No.

Q. But you had reason to believe that in some manner or other those gloves too were somehow connected with this thing?

A. Could have been; yes, sir.

Q. When did you take the paint chips from around the window?

A. Before noon on the day of the 1st.

Q. But it was the following morning?

A. Yes, it was.

Q. So it was after Officer Ashley had taken these pictures of that window?

A. Yes, sir.

MR. SMITH: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. TRAPP:

Q. Captain Toller, I believe you stated on cross-examination that you and your police force maintain a working cooperation with the Post Office agents and the Post Office in

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Saylors—Direct

[375] MR. WINKLER: Our interest is in showing that the men were brought to Captain Toller's office individually and that's all we are interested in it doing.

MR. SMITH: Your Honor, if the Court please, we will stipulate that the men were individually brought to Captain Toller's office.

THE COURT: All right. Let's stay away from this interview because that always has a connotation that we all know about; and the Constitution says as clear as can be said if I am under arrest I don't have to say one thing and nobody will pay any attention to it.

O. K., let's go.

Q. Lieutenant Saylors, after the interviews were over what was done with the prisoners?

A. They were returned back to the cell.

Q. Were they placed in individual cells?

A. Yes, they were.

Q. Now, Lieutenant Saylors, I am going to direct your attention to the morning of June the 1st of 1970. What, if anything, did you do?

A. Again I met in Captain Toller's office and then I departed the office and went to Kaufman's Clothing Store, where I purchased some clothing for the defendants, the [376] three people.

Q. And after you purchased this clothing what did you do?

A. I returned back to the police station, back to Captain Toller's office. The prisoners were brought in, one at a time, and the clothing were exchanged. Their clothing were taken from their person and placed in individual packets, grocery sacks, and they were initialed and labeled by Captain Toller and myself.

MR. TRAPPP: Gentlemen, are you willing to stipulate—

MR. SMITH: Your Honor, we have already stipulated the bags. We stipulate them again.

MR. TRAPP: All right.

Q. Where was this clothing kept, to the best of your knowledge, Lieutenant Saylors?

A. In the custody of Captain Toller, under lock and key in his office.

Q. Lieutenant Saylors, do you recall making a trip to London, Ohio?

A. Yes, I did.

Q. Do you recall what the purpose of that trip was?

A. Pertaining to these people, the first trip was about the 15th of June. I went to London to receive a

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Beckman—Direct

[484] Mr. Edwards.

MR. McCROOM: I will object.

THE COURT: O. K. I think we can maybe end this repeating if we just understand that the objection is caused by difficulty in terminology, or it's always hard to communicate, say, one field of business or science into another; and whenever a witness uses the term

"known" with one of these people, they have to object as lawyers.

Now, you as jurors know that when the witness uses the term "known" or "it came from," that he doesn't know anything about actually where these came from. He is not using it in that sense.

So I think if we all understand that, maybe we can go ahead and everybody will understand each other and counsel won't have to object, which they obviously have had to do. That's no criticism of you, sir. We all have the same problem.

THE WITNESS: Thank you.

A. (Continued.) Well, on top of this series of spectra I have listed X as being the known, Q1 as being a piece of paint which I found in the debris coming from the defendant Edwards' clothing; and Q2, a piece of paint which I found coming from the defendant Livesay's clothing and Q3 is paint coming from another defendant who is not involved.

* * * *

[470] accurately states what he can give an opinion on.

THE COURT: All right. It will be limited to that.

MR. TRAPP: All right, your Honor. I will rephrase the question, limiting it to the paint sample from inside of the windowsill in the Lebanon Post Office.

Q Mr. Beckman, on the basis of your microscopic examination and on the basis of your examination by neutron activation analysis, do you have an opinion within a reasonable degree of scientific certainty as to whether the paint samples, the questioned paint samples, which were labeled as coming from the defendants' clothing, the two defendants' clothing, and the known paint samples labeled as coming from inside the windowsill of the Lebanon Post Office, originated or came from the same source?

THE COURT: You may answer.

A. Yes, sir.

Q. And what is that opinion?

A. On the basis of the microscopic agreement in which there were four layers in both of the questioned exhibits

and there were four layers on the known exhibits, that these layers did microscopically match; and on the basis of having the same trace element composition, at least qualitatively, and also on the basis of having four layers [471] of paint and only occurring in five elements—this is unusual—I would say that these two paint samples Q1 and Q8 which came from two of the defendants' clothing did come from the same source that the X paint sample came from.

Q. Thank you, Mr. Beckman. I have a couple of more questions, sir.

Mr. Beckman, why did you choose neutron activation analysis over other conventional means of trace elemental analysis?

A. Well, there are three good reasons why I chose neutron activation over anything else. The first one is the high detection level that we have. Like I said before, radioactive processes are by far the more superior for detection level.

To give you a feel of this, atomic absorption is another form of elemental analysis and it's considered to be very, very good. It has a detection level of what we can detect of one part per billion of an element. So if this is supposed to be one part per billion copper, we could detect this with atomic absorption. Well, neutron activation happens to be 1,000 times even more sensitive or have a higher detection level than atomic absorption.

The second reason is the sample size. I have talked about this earlier. I routinely analyse paint samples, human hairs, which weigh only a few micrograms. A small

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SUPREME COURT OF THE UNITED STATES

No. 78-88

UNITED STATES, PETITIONER

v.

EUGENE H. EDWARDS and WILLIAM T. LIVESAY
ORDER ALLOWING CERTIORARI—Filed October 9, 1978
The petition herein for a writ of certiorari to the
United States Court of Appeals for the Sixth Circuit is
granted.

